No.

Supreme Court, U.S.
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In the

SUPREME COURT of the UNITED STATES

October Term, 1993

STEVEN P. BOUREXIS,

Petitioner,

v.

CARROLL COUNTY [MARYLAND] NARCOTICS TASK FORCE, *et al.*

Respondents.

Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, with Appendix

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether police officer members of a "narcotics task force" violate an attorney's constitutional rights -- to due process, equal protection, and free speech -- when the officers execute a "policy and practice" of the task force by discriminating against criminal suspects who employ or seek to employ that attorney.

2. Was due process offended by the appellate court's affirmance of summary judgment on a factual ground -- absence of economic injury -- not reached by the trial court and not raised by the moving party.

PARTIES TO THE PROCEEDING

Petitioner Stephen P. Bourexis initiated this proceeding in the Circuit Court for Carroll County (Maryland) to redress federal and State Constitutional claims and State common law claims arising from actions taken by members of the Defendant Carroll County Narcotics Task Force.

The Carroll County Narcotics Task Force and two of its members -- police officers Robert Heisler and Andrew McKendrick -- were named as Defendants in the action brought in the Circuit Court for Carroll County and are Respondents herein.

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OPINIONS BELOW

The order of the Court of Appeals of Maryland denying certiorari is reprinted in Appendix A hereto.

The opinion of the Court of Special Appeals is reported at 96 Md.App. 459, 625 A.2d 391 (1993), and is reprinted in Appendix B hereto.

The order of the Circuit Court for Carroll County is reprinted in Appendix C hereto.

STATEMENT OF JURISDICTION

The opinion of the Court of Special Appeals was entered on June 3, 1993. The order of the Court of Appeals of Maryland was entered on October 28, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United State Code

Title 42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the

deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The petitioner, Stephen P. Bourexis, has a general practice in Westminster, Maryland. [1/] A large part of the practice is devoted to representing persons accused of drug related offenses.

While Bourexis was representing one of his clients charged with various narcotics offenses at a Bond Revocation hearing, two members of the Carroll

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1. Bourexis is currently voluntarily suspended from practice for six months following an investigation conducted by the State's Attorney's Office for Carroll County. Petitioner only raises this issue in anticipation of a mootness argument; the issue is not moot since Petitioner will resume practice in June, 1994.

County Narcotics Task Force [2/] testified that it was the policy and practice of the Narcotics Task Force to refuse to work with persons who were represented by the Plaintiff and that they had so advised the Plaintiff's client.

Bourexis filed a Complaint for Injunctive Relief and for Damages in the Circuit Court for Carroll County, Maryland, naming as defendants the two law enforcement officers who had testified at the Bond Revocation Hearing and the Carroll County Narcotics Task Force. The Plaintiff requested relief pursuant to 42 U.S.C. Section 1983, claiming violations of his right to due

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2. The Carroll County Narcotics Task Force is an interdisciplinary group of law enforcement officers who investigate and arrest persons suspected of narcotics offenses. Assigned to the Task Force are members of the Sheriff's Department, the Maryland State police and the Westminster City police. Counsel for the Task Force claimed that it "is not a legal entity...it is a legal cooperative effort of police agencies."

process, equal protection and freedom of speech, as well as various Maryland constitutional law claims and common law torts. (Reprinted at Appendix D, infra.)

The Plaintiff moved for a preliminary injunction and the Defendants filed a Motion to Dismiss/Motion for Summary Judgment on the grounds that the law enforcement officers had prosecutorial immunity [3/] and that the Plaintiff lacked standing to assert his clients' rights.

Following a hearing on Plaintiff's Motion for Preliminary Injunction and Defendants' Motion to Dismiss/Motion for Summary Judgment, the Circuit Court (Raymond E. Beck, Sr.) denied the Plaintiff's Motion for Preliminary

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3. The Plaintiff did not sue the State's Attorney nor was there any evidence adduced to connect the State's Attorney with the Carroll County Narcotics Task Force nor its policy and practice regarding the Plaintiff.

Injunction from the bench, giving no reasons therefore (R. M-113), and subsequently issued a written order (Appendix C) dismissing Plaintiff's Complaint for failure to state a cause of action as to all counts and finding that "some government immunity applies."

Plaintiff appealed. Stating that "(w)e are unaware of any other case in the country involving precisely this situation," the Court of Special Appeals of Maryland chastised the Task Force for its behavior, citing two cases in other states where similar conduct had met, in one case with disciplinary proceedings against a prosecutor who had discriminated against a particular attorney's clients simply because they were that attorney's clients, and another where charges against a defendant had been dismissed when the prosecutor sent

the client to another attorney. [4]

However, the Court of Special Appeals affirmed the decision of the Circuit Court (while awarding costs to the Plaintiff) finding that Plaintiff had failed to prove damages but not addressing Plaintiff's request for injunctive relief.

Little wonder, however, that the Plaintiff had failed to prove damages: summary judgment was granted below on the basis of "some form" of immunity and failure to plead a valid cause of action. Indeed, Defendants had argued below that Plaintiff should be denied preliminary injunctive relief in favor of a later opportunity to seek compensatory damages, if their immunity defense was rejected.

Furthermore, the two cases cited by

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4. Complaint of Rock, 556 P.2d 1351 (Or. 1976); Boulas v. Superior Court, 188 Cal. App. 3d 422 (1986).

the Court of Special Appeals had to do with prosecutorial misconduct, whereas there was nothing in the record to connect the State's Attorney with the behavior of the Carroll County Narcotics Task Force beyond its assertion that it was entitled to prosecutorial immunity (and the caption of the Complaint which stated that it should be served on the Senior Assistant State's Attorney as Coordinator of the Narcotics Task Force). Indeed, Plaintiff testified that he continued to successfully plea bargain with members of the State's Attorney's office.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner's due process, equal protection and first amendment claims were presented in Counts one, two, five, six, nine and ten in his Complaint for Injunctive Relief and for Damages. The

Circuit Court dismissed the Petitioner's constitutional claims for "failure to allege sufficiently a deprivation of a property interest...and a violation of equal protection of the law and...a violation of Plaintiff's freedom of speech..." and further found that "some government immunity applies." (Appendix C, infra.)

Petitioner again asserted these claims in his brief to the Court of Special Appeals of Maryland which accepted the constitutional validity of Petitioner's claims but affirmed the Circuit Court's dismissal of Petitioner's Complaint because "he has alleged conduct that may be wrongful to others but none that has wronged him. (Appendix B). Petitioner again asserted his claims to the Court of Appeals of Maryland in his Petition for a Writ of Certiorari to the Court of Special Appeals, and that

Court denied certiorari (Appendix A.)

The asserted violation of due process that occurred when the appellate court affirmed on the ground that Petitioner had failed to show economic harm was not raised below, because the issue did not appear until issuance of the opinion of the Court of Special Appeals.

REASONS FOR GRANTING THE WRIT

1. Police officer members of a "narcotics task force" violate an attorney's constitutional rights -- to due process, equal protection, and free speech -- when the officers execute a "policy and practice" of the task force by discriminating against criminal suspects who employ or seek to employ that attorney.

In affirming the Circuit Court dismissal of the Petitioner's Complaint, the Court of Special Appeals said, "Nor...has there been any specific allegation, or evidence, that he has lost any client or prospective client or that

he has been required to charge less in fees than he otherwise would have charged because of the Task Force policy. In short, he has alleged conduct that may be wrongful to others but none that has wronged him. It is for that reason, and that alone, that we affirm the judgment entered below" (Appendix B, infra).

The conduct of the police in this case strikes at the heart of the attorney-client relationship, and while the client's Sixth Amendment right to counsel was violated by the police misconduct in this case, that client's attorney's right to practice his profession was equally violated under the due process and equal protection guarantees of the Fourteenth Amendment and the freedom of speech guarantee of the First Amendment.

This Court has recognized the right of an alien to work irrespective of

quotas, Truax v. Raich, 239 U.S. 33 (1915), the right of private schools to conduct the business of education, Pierce v. Society of Sisters, 268 U.S. 510 (1925) and the right of a doctor to practice his profession, Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). Although the laws held unconstitutional were aimed at the employer (as in Truax), the students (as in Pierce) and the patients (as in Thornburg), enforcement of these laws damaged or threatened to damage those who asserted the constitutional violation.

In the instant case, petitioner seeks relief from the policy and practice of the Narcotics Task Force which poses a real and present danger to petitioner's ability to practice his profession and poses an imminent danger to his

reputation as a lawyer. [5/] "It requires no argument to show that the right to work for a living in the common occupations

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5. At the hearing on Plaintiff's motion for a preliminary injunction, one of Plaintiff's clients testified that he had known Plaintiff approximately sixteen years and that during that time he had referred between five and seven people to him, of whom some were involved in civil matters but most were involved in criminal matters, but that now he "would be hesitant in recommending someone to him in a--certain criminal aspects of the law * * *due to the article I read in the paper in the spring...it was in regard to this Task Force and...what I got out of it was that--Bourexis' clients would not be treated the same as anyone else's clients" (R. M-79-M-81).

Petitioner himself testified that there had been a decline in his drug related business since March, 1992 to the time of the hearing on the interlocutory injunction, but was unable to quantify this. He based this on his "experience in handling cases in the practice of law of more than twenty years and simply being sensitive to what's happening in the community in terms of arrest...that the volume of work that has occurred since maybe--I don't know, maybe even six months, but certainly since April, has diminished." (R. M.48)

See also the testimony of Gordon Cartnail at his Bond Revocation hearing, reprinted at Appendix D. where he testifies that "by him [McKendrick] saying what he said about my lawyer and everything, I have double...thoughts in my mind about using him, because I think if I use him, that I willl not get a fair trial if they gonna say that he's an asshole and everything, and I don't think my trial is gonna be fair."

of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." (Truax, *supra* at 41).

The police misconduct in this case, if allowed to continue unchecked, undermines the foundation of the attorney-client relationship that all states recognize through the attorney-client privilege [for example, in Maryland the privilege has been held to be founded on the public policy that an individual in a free society should be encouraged to consult with his attorney, State v. Pratt, 284 Md. 516, 398 A.2d 421 (1979)] .

In Pierce v. Society of Sisters, *supra*, this Court held that injunctive relief was appropriate where a state statute threatened the destruction of

plaintiff's business, operating a private school. To the State's argument that "no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage," the Court replied that "the injunctions here sought are not against the exercise of any proper power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their property...The injury to appellees was present, and very real...If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

The petitioner has a property interest in his livelihood that is protected under the due process clause of the Fourteenth Amendment. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). This property interest is created and defined "by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, *supra* at 577.

In the case of an attorney, these rules and understandings are created under state statutes, rules of procedure, and common law. (For example, the Preamble to the Maryland Lawyers' Rules of Professional Conduct states, in relevant part, that "ultimate

authority over the legal profession is vested largely in the courts...An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the government for the right to practice." Maryland Rules, Vol. 2, p. 495.)

Law enforcement officers do not have the authority to govern or to interfere with the relationship between a lawyer and his client and it cannot seriously be contended that they do.

Furthermore, as the Court of Special Appeals of Maryland recognized in its opinion below, "(w)e reject, therefore, the notion that, because no individual defendant has a constitutional right to

insist upon the offer of a plea bargain, police officers and prosecutors can engage in categorical discrimination based on `arbitrary classification,'" citing Bordenkircher v. Hayes, 434 U.S. 357, *reh. denied sub nom.* Browder v. Director, Department of Correction of Illinois, 434 U.S. 1089 (1978).

Bourexis only parts company with the decision of the Court of Special Appeals when it suggests that he is not entitled to relief because he should have waited to file his Complaint until after the irreparable damage from which he sought injunctive relief occurred. This is not the law.

2. Due process was offended by the appellate court's affirmance of summary judgment on a factual ground -- absence of economic injury -- not reached by the trial court and not raised by the moving party.

The claims set forth in the complaint filed by Petitioner are a

species of property, which may not be extinguished without due process of law, Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265 (1982). Due process requires an opportunity to be heard at a meaningful time. Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, 32 (1976).

Here, Petitioner never had an opportunity to demonstrate that economic injury flowed from the actions complained of. The motion to dismiss / motion for summary judgment filed by the Defendants made no mention of an asserted inability of Plaintiff to show that he suffered economic injury. Indeed, Defendants opposed Plaintiff's motion for preliminary injunctive relief by arguing that Plaintiff's should be denied that relief in favor of having an opportunity in due course to seek compensatory damages.

Then, however, the Court of Special Appeals concluded that the summary judgment granted by the trial court should be affirmed because Petitioner had failed to demonstrate economic injury. It is difficult to imagine a scenario in which a party is more clearly denied a "meaningful opportunity to be heard."

Indeed, the Maryland courts have recognized the very principle Petitioner invokes. In Ungar v. Handelsman, 325 Md. 135 (1992), for instance, the Court of Appeals reversed the trial court's dismissal of claims expressly in reliance on information that had been supplied from an unknown source, without affording the plaintiff (the party adversely affected by the information) an opportunity to respond to the information.

Similarly, in Phillips v. Venker,

316 Md. 212, 217-222 (1989), reversal was ordered after the trial judge initiated a conference call with counsel to discuss a scheduling matter and then decided the case on the merits in the course of the call. Although counsel for the (nonprevailing) plaintiff was on notice as to the factual and legal contentions of his opponent, which apparently were the basis for the decision, this court nevertheless concluded that the plaintiff's due process rights were violated.

CONCLUSION

For these various reasons, this petition for certiorari should be granted and the judgment of the Court of Special Appeals of Maryland affirming the dismissal of petitioner's Complaint should be reversed, and the case remanded

to the Circuit Court for Carroll County, Maryland, with instructions to issue a permanent injunction and to hold a trial on the petitioner's Complaint for damages.

Petitioner submits that the issue raised by the police misconduct complained of herein is one of first impression. The conduct that Petitioner seeks to redress subverts one of the most important relationships in the necessary tension between the rights of the individual and the authority of the State. If such conduct as that decried here is undeterred, that tension will inevitably be relaxed in favor of the already awesome

prosecutorial powers of the

State.

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IN THE COURT OF APPEALS OF MARYLAND

STEPHEN P. BOUREXIS	) Pet. Doc. No. 316
	) September Term,
v.	) 1993
	) Sept. Term, 1993
THE CARROLL COUNTY NARCOTICS TASK et al.	) No. 1595, Sept. Term, 1992, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy,
Chief Judge

Date: October 28, 1993

APPENDIX A

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1595

September Term, 1992

STEPHEN P. BOUREXIS

v.

THE CARROLL COUNTY NARCOTICS TASK FORCE, *et al.*

Wilner, C.J.
Motz
Bell, Rosalyn B. (retired, specially assigned),

JJ.

Opinion by Wilner, C.J.

Filed: June 3, 1993

APPENDIX B

Appellant is an attorney who practices in Carroll County. In June, 1992, he filed a 14-count complaint in the Circuit Court for that county against "The Carroll County Narcotics Tasks Force, a.k.a. Drug Enforcement Bureau," Andrew McKendrick, and Robert Heisler. Messrs. McKendrick and Heisler were sued individually and in their capacities as members of the Carroll County Narcotics Task Force.

The predicate of all 14 counts was stated in several introductory paragraphs of the complaint. Appellant averred that the Task Force "is composed of law enforcement officers from various law enforcement agencies who purport to operate under the laws of the State of Maryland" and that McKendrick and Heisler acted individually as members of that Task Force. He asserted that "[i]t is the policy and practice of the Defendants

Task Force, McKendrick and Heisler" (1) "to refuse to work with persons suspected of, or arrested in connection with, drug offenses who are represented by the Plaintiff and not by other lawyers," (2) "to inform persons who have been arrested on drug-related charges that if such persons are represented by the Plaintiff that the Defendants will discriminate against them but will not discriminate against them if they use any other attorney," and (3) "to inform the Plaintiff's existing clients that they will be discriminated against as long as they are represented by the Plaintiff." Finally, appellant alleged that

> "The Defendants have adopted this policy and practice in order to damage the Plaintiff's practice by retaliating against him for his representation of certain persons who have been charged with drug-related offenses and in order to prevent him from continuing to represent persons who have been charged with drug-related offenses."

This conduct, appellant complained, deprived him of three basic rights under the Federal and State Constitutions - a property interest in his livelihood (Counts 1-4), equal protection of the laws (Counts 5-8), and freedom of speech (Counts 9-12) - and constituted as well as intentional interference with his business in violation of State common law (Counts 13 and 14). In each of these counts, appellant asked for substantial compensatory damages and an injunction to restrain the defendants from "continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff." In several of the counts (2, 4, 6, 8, 10, 12, and 14), appellant alleged that the conduct complained of

was malicious, and in those counts he also asked for punitive damages.

The defendants answered appellant's request for an interlocutory injunction and moved to dismiss the complaint or, in the alternative, for summary judgment. The thrust of their response, and their position throughout these proceedings in both the Circuit Court and this Court, is that appellant's complaint really is that the Task Force will not negotiate plea bargains with anyone represented by him. Appellant agrees that that is essentially what he is complaining about - the refusal to "work with" his clients and the discrimination threatened or practiced is in the context of excluding them from the opportunity to obtain the benefits derived from a plea agreement. The defense to the complaint, read in that light, is that, as appellant's clients have no legally protected right

to a plea bargain or to receive favors from the Task Force, appellant can have no derivative claim when bargains or favors are denied to his clients. Apart from that, the defendants also assert that, as they are engaged in what is essentially a prosecutorial function, they are protected by the immunity applicable to prosecutors.

At a hearing on both the request for interlocutory injunction and the motions to dismiss, appellant presented evidence regarding two of his clients - Doyle Barnes and Gordon Cartnail. In an affidavit, Mr. Barnes said that after his arrest in December, 1989, he had worked out an agreement with McKendrick and the Task Force under which the Task Force would forgo seizing his car if he paid McKendrick $800 by February 1, 1990. He paid $500 but could not come up with the

other $300 by February 1. [1] On February 6, he took the other $300 to McKendrick, who told him, in effect, that the deal was off and that he had already filed papers against Barnes. When he asked McKendrick if he could get the car back, McKendrick said that "as long as Bourexis is your lawyer, you can guarantee you'll never get your car back. He said that 'we will not work with you.'" When asked why, McKendrick said, "'We do not like Bourexis.'" The affidavit did not indicate what happened thereafter to Mr. Barnes - whether he worked out a plea bargain or was required to stand trial. Appellant acknowledged that he continued

[1] This was the only evidence regarding the payment of money to a member of the Task Force. The record is otherwise barren with respect to how the Task Force is funded or what happens to money paid to it by criminal defendants or others.

to represent Barnes "in the disposition of his case."

The evidence regarding Cartnail was in the form of excerpts from testimony given by Detectives McKendrick and Heisler at a proceeding to revoke Cartnail's bond. Under cross-examination by appellant, McKendrick admitted cancelling [*sic*] a deal with Cartnail. He initially said "I told him that if he continued to have you as re -- as his counsel, that I would not be working with him" but continued that "after the statements that were said at the end of the process, I have no intention of working with him, no matter who he has for counsel." When Cartnail asked why McKendrick would not work with him while represented by appellant, McKendrick replied that "nothing ever seems to work out when we have you as defendant's counsel," that "I told him in no

uncertain terms that if you represented [him] for counsel, we would not be working with him," and that "if he had other attorneys, it would be no problem." Heisler also said, under cross-examination, that it was "probably common knowledge with everybody in the Task Force" that "we're not gonna work with anybody that's represented by you, Mr. Bourexis." Heisler said that it was a matter of policy and was nothing personal against appellant, although Cartnail gave testimony to the effect that the Task Force's policy was based on its perception that appellant was an "asshole."

Appellant himself testified at the hearing in this case. He described the process of "working with" the Task Force as essentially providing information, either directly to members of the Task Force or to other law enforcement

officers who would then relay the information to the Task Force. He later added that making drug buys was also part of it. At one point he said that "[t]here are basically no promises or no commitments made" for such cooperation beyond bringing it to the attention of the prosecutor, but he later said that it might result in the prosecutor agreeing "not to allocate at sentencing" or to reduce charges. He acknowledged that some of his clients have chosen as a matter of strategy not to cooperate with the Task Force, and that that has not prevented him from working out plea bargains with the State's Attorney. He offered some conclusory evidence, devoid of detail, that his practice had suffered because of the Task Force policy of not "working with" his clients. He did not assert that any particular client had terminated his services because of the

Task Force's policy or that any particular prospective client failed to retain him on account of the policy.

Upon the evidence presented and the memoranda filed by the parties, the court entered an order on September 30, 1992, treating the motions to dismiss as motions for summary judgment under Md. Rule 2-322(c), granting those motions, and denying injunctive relief. In various "Whereas" clauses, the court concluded that (1) the Task Force was "not a legal entity" and had no "entity status upon which it can be sued," (2) the prosecutor member of the Task Force, with the advice of the police members, had "full discretion . . . to deem a particular criminal defendant untrustworthy-by-association and to choose not to enter plea negotiations," (3) no one had a "legal right or property interest in negotiating plea agreements,"

(4) Counts 1 through 4 of the complaint failed to allege sufficiently a deprivation of a property interest, (5) Counts 5 through 8 failed to allege sufficiently a violation of equal protection of the laws, (6) Counts 9 through 12 failed to allege sufficiently a violation of appellant's freedom of speech, (7) Counts 13 and 14 failed to allege a cause of action "in that those counts only allege a willful or malicious conduct in communicating to persons in order to cause damage," and (8) "some government immunity applies."

In this appeal, appellant attacks each of those conclusions. He argues that the Task Force is an entity that may be sued, that the police members do not have the immunity available to a prosecutor and are not immune from suit, that his complaint did state causes of action, and that he was entitled to an

injunction. The defendants, of course, believe that the trial court was right on target. McKendrick continues to view the Task Force's role as part of the prosecutorial plea bargaining process, thereby cloaking all of its members with a prosecutorial immunity. Heisler does not repudiate that approach but asserts further immunity under the Tort Claims Act. More fundamentally, they look at appellant's complaint as alleging merely a refusal by the Task Force to engage in plea bargaining and, seizing upon the pronouncement of the Supreme Court in Weatherford v. Bursey, 429 U.S. 545 (1977), that there is no constitutional right to a plea bargain, urge that, as appellant's clients have no protected right to a plea bargain, appellant has no cognizable claim when the Task Force refuses to enter into such bargains with his clients.

Status Of The Task Force

Before considering the heart of this case, we shall briefly address the status of the Task Force. As noted, it was a named defendant in the complaint. The only allegation as to its nature and status, however, is that it is located in Carroll County and "is composed of law enforcement officers from various law enforcement agencies who purport to operate under the laws of the State of Maryland." No evidence regarding its organization, governance, powers, financing, or property was offered. It was described by defense counsel as "a cooperative effort" between the Westminster City Police and the Maryland State Police or a "duty assignment." There is nothing in the record to indicate whether it even has an office, employees, stationery, or a telephone

number. In short, there is nothing to show it is an entity that may be sued.

Appellant points to Md. Code Cts. & Jud. Proc. art., subsection 6-406(a), which provides that "[a]n unincorporated association, joint stock company, or other group which as a recognized name may sue or be sued in the group name on any cause of action affecting the common property, rights, and liabilities of the group." (Emphasis added.) This statute, he says, allows a group with a recognized name to be sued in an action affecting the rights and liabilities of the group, and that, he claims, is what his action involves.

Section 6-406 was derived from former Md. Code art. 23, subsection 138, which provides that "[e]very unincorporated association or joint stock company having a recognized group name may sue or be sued in such group name in

any action affecting the common property, rights and liabilities of such association or joint stock company." Article 23 was the article dealing with corporations, and subsection 138 was part of the subtitle of that article governing non-stock corporations. When, as part of the general code revision process, the General Assembly enacted the Corporations and Associations article in 1975 (1975 Md. Laws, ch. 311), most of article 23, including the balance of the subtitle on non-stock companies, was transferred to that new article. Section 138, however, was rewritten in the standard code-revision language and, by separate bill (1975 Md. Laws, ch. 378), was transferred to the Courts and Judicial Proceedings article, probably because it dealt more with judicial proceedings than with the substantive law of corporations and associations.

In rewriting the section, the General Assembly added the phrase "or other group" to the two kinds of entities -- unincorporated associations and joint stock companies -- included in the repealed provision. There is no indication that any substantive change was intended, however. The title to the bill, which limits its permissible scope (Md. Const., art. III, subsection 29), states that it is:

> "For the purpose of transferring certain provisions relating to unincorporated associations, joint stock companies, and other groups from one article of the Code to another; changing style and punctuation; repealing certain obsolete provisions relating to certain proceedings by or against certain groups; and correcting cross references to those provisions."

Especially in light of this title, we do not read ch. 378 or the language it enacted as expanding the kinds of unincorporated entities that may be sued in their group name to include amorphous

groups having no clear separate identity, simply because they have a group name. And on the record in this case, we do not believe it includes the Carroll County Narcotics Task Force. We therefore find no error in the judgment in favor of the Task Force.

Right to Plea Bargain

The principal defense, apart from immunity, is that, because appellant's clients have no right to a plea bargain, he has no cause of action because the members of the Task Force refuse to engage in plea bargaining with his clients. There are a number of responses to that argument.

The only individual defendants sued are the two police officers who have refused to "work with" appellant's clients. Because they see some succor in a brief pronouncement in Weatherford v. Bursey, *supra*, 429 U.S. 545, 561 that

"there is no constitutional right to plea bargain." the officers regard themselves as part of the plea bargaining process. That, indeed, lies at the heart of their defense. Before addressing that supposition, we need to look at Weatherford in its proper context.

Weatherford was an undercover police agent. He, Bursey, and two others vandalized a Selective Service office in South Carolina. To maintain his cover, Weatherford was arrested and charged along with Bursey. Unaware that Weatherford was a police officer, Bursey and his lawyer invited him to participate in some strategy sessions. Weatherford did not ask to participate and did not solicit any information from Bursey; indeed, he said that he intended to seek a severance because of Bursey's past record. The prosecution did not initially intend to use Weatherford as a

witness, but by the eve of trial his undercover status had become attenuated, and so he was called and testified. Following his conviction, Bursey filed an action in Federal court under 42 U.S.C. subsection 1983, alleging that Weatherford had communicated information to his superiors and thereby deprived Bursey of the effective assistance of counsel and due process of law. The District Court entered judgment for the defendants, finding, among other things, that Weatherford had not communicated to his superiors any information learned from Bursey. The Court of Appeals for the Fourth Circuit reversed, concluding that Bursey's rights to the effective assistance of counsel and a fair trial had been violated.

The thrust of the Supreme Court's Opinion dealt with that issue, the Court ultimately concluding that Bursey's

rights had not been violated. It declined to adopt a per se rule prohibiting this kind of undercover operation, and it rejected Bursey's complaint that the government had violated his right to discover the identity of an informant. Indeed, the principal holding in the case, for which it is most often cited, is that "[t]here is no general constitutional right to discovery in a criminal case, and Brady [v. Maryland, 373 U.S. 83 (1963)] did not create one." 429 U.S. at 559. In its concluding paragraph, the Court addressed, and rejected, a concern expressed by the Fourth Circuit court:

> "The Court of Appeals suggested that Weatherford's continued duplicity lost Bursey the opportunity to plea bargain. But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty."

Id. at 560-61.

This is a thin strand, indeed, on which to hang the heavy notion that it is permissible for prosecutors and police officers to engage in categorical discrimination based on who the defendant's lawyer happens to be, simply because they do not like the lawyer. One court has expressed the thought that "[b]ecause a defendant is not constitutionally entitled to a plea offer, no constitutional rights are connected to the plea bargaining process." Winokur v. State, 605 So.2d 100, 102 (Fla. App. 4 Dist. 1992). That is clearly not the case. It is a constitutional mandate that a guilty plea induced by a plea bargain be knowing, intelligent, and voluntary and that the record demonstrate that fact (Boykin v. Alabama, 395 U.S., 238 (1969)), that the

defendant have been afforded the assistance of counsel during the plea bargaining process (Moore v. Michigan, 355 U.S. 155 (1957)), and that the State carry out its obligations under any plea bargain it makes (Santobello v. New York, 404 U.S. 257 (1971)). See also Wilson v. U.S., 606 A.2d 1017 (D.C.App. 1992). More broadly, the Supreme Court pointed out in Bordenkircher v. Hayes, 434 U.S. 357, *reh. denied sub nom.* Browder v. Director, Department of Correction of Illinois, 434 U.S. 1089 (1978), that the discretion possessed by prosecutors in the plea bargaining process is not without limitation. At 365, it said: "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be,

there are undoubtedly constitutional limits upon its exercise." At 364, the Court, quoting in part from Oyler v. Boles, 368 U.S. 448, 456 (1962), noted that "'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'"

We reject, therefore, the notion that, because no individual defendant has a constitutional right to insist upon the offer of a plea bargain, police officers and prosecutors can engage in categorical discrimination based on "arbitrary classifications." We raised the question at oral argument, and did not get a clear or satisfactory response, as to whether prosecutors or police officers could

refuse to enter into plea negotiations with defendants solely because of the race, gender, or religion of their attorneys (or indeed of the defendants). The rigid proposition espoused by appellees would require an affirmative answer to that question, but counsel appeared to recognize, as the Court certainly did, the irreconcilable conflict between such an answer and the very bedrock of our jurisprudence. The answer cannot be "yes," and so the proposition, as put, cannot be valid.

We are unaware of any other case in the country involving precisely this situation, and none has been cited to us. We have discovered, however, two cases that provide some guidance and to which the Carroll County Narcotics Task Force and its advisors may wish to give some thought. The first is Complaint of Rook, 556 P.2d 1351 (Or. 1976), where the

Oregon Supreme Court disciplined a local prosecutor of violating the Code of Professional Responsibility by offering a plea agreement to one group of defendants but refusing to make a similar offer to other defendants, similarly situated, solely because they had a different lawyer who was not to the prosecutor's liking.

The second is Boulas v. Superior Court, 188 Cal. App. 3d 422 (1986). A defendant, Boulas, desiring to work out a plea agreement, was told by the prosecutor that he would first have to discharge his current attorney and retain one more to the prosecutor's liking. After rejecting several nominees proposed by the defendant, the prosecutor essentially steered him to an acceptable lawyer, but that lawyer refused to take the case. Boulas eventually rehired his initial attorney, who, upon learning what

had occurred, filed a motion to dismiss the case on the ground of prosecutorial misconduct. The trial court, though concluding that Boulas's rights had been violated, nonetheless denied the motion on the ground that he had not been prejudiced and that he could be protected by exclusion of any information gleaned by the prosecution as a result of its interference. The California Court of Appeals reversed, declaring that the motion should have been granted. In reaching that conclusion, the Court held that the prosecutor was "obligated to give due respect to, and to preserve, Boulas's choice of counsel," that his course of conduct "actively caused irremediable harm to Boulas's relationship with his attorney as was, therefore, improper," and that "[t]he intentional undermining of an individual's right to counsel of his own

choosing cannot be countenanced under any rational standard of justice." 188 Cal. App. 3d at 433, 434. It thus stated, at 434:

> "No relief, such as suppression or reversal of conviction, would remedy the violation. Furthermore, considering the extent and seriousness of the conduct of those in positions of authority and public trust, we find the grave sanction of dismissal to be the sole appropriate remedy for intentional and calculated violation of Boulas's rights. We find the government conduct in the present matter to be outrageous in the extreme, and shocking to the conscience; we are, thereby, compelled to order the dismissal of the present case."

Our rejection of the notion that Weatherford allows the Task Force or its members to engage in whatever discrimination they choose does not end the inquiry. We have a particular complaint, supplemented by the evidence adduced at the hearing, and it is that which frames the issues before us.

Unlike Boulas, appellant is not a

criminal defendant asserting that the prosecutor, or police officers associated with the prosecutor, have interfered with his right to counsel or to a fair trial. The essence of his grievance is that the defendants have interfered with his occupational opportunities by making him less desirable to have as a lawyer. There is no contention by him, however, either in his complaint or in the evidence offered at the hearing, that any client of his or any prospective client of his has actually been denied the opportunity to negotiate a plea agreement or has been denied terms of a plea agreement offered to other defendants. There is no contention, and no evidence, that either the refusal of the two police officers to "work with" his clients or any other discrimination practiced by them has caused the prosecutor to treat appellant's clients any differently than

he or she has treated other defendants in terms of charging or of offering or negotiating plea agreements. Indeed, appellant testified that he had, in fact, worked out plea agreements for some of his clients despite the policy of the Task Force. Nor, as we have noted, has there been any specific allegation, or evidence, that he has lost any client or prospective client or that he has been required to charge less in fees than he otherwise would have charged because of the Task Force policy. In short, he has alleged conduct that may be wrongful to others but none that has wronged him.

It is for that reason, and that alone, that we affirm the judgment entered below. We shall, however, in the exercise of our discretion, assess the costs of this appeal against appellees.

JUDGMENT AFFIRMED;

APPELLEES TO PAY THE COSTS.

IN THE CIRCUIT COURT FOR CARROLL COUNTY

STEPHEN P. BOUREXIS *

Plaintiff *

v. * Case No. C-92-13193

CARROLL COUNTY NARCOTICS TASK FORCE, et al. *

Defendants

ORDER

Upon consideration of Plaintiff's Complaint, several Defendants' Motion to Dismiss/Motion for Summary Judgment, Plaintiff's responses, and argument ordered on September 18, 1992 and

WHEREAS this Court treats Defendants' motions to dismiss as motions for summary judgment pursuant to Md. Rules 2-322(c) and 2-501 in that matters outside the pleading were presented and not excluded and

APPENDIX C

(filed 9/29/92)

WHEREAS counsel for the State admitted and argued that the Carroll County Narcotics Task Force is merely the designation of a cooperative duty-assignment between different police agencies and the county prosecutor; it is not a legal entity and it appears to have no right to sue nor does it have an entity status upon which it can be sued and

WHEREAS it is undisputed that an officer on the Task Force stated that it was the prosecutor's policy not to negotiate plea agreements with persons represented by Plaintiff and

WHEREAS such a policy might be interpreted by Plaintiff's clients, and potential clients, to mean that Plaintiff is tough, aggressive and an unyielding fighter for the legal rights of Plaintiff's clients and

WHEREAS the prosecutor member of the

Carroll County Narcotics Task Force has full discretion, based on advice of officers and other information, to deem a particular criminal defendant untrustworthy-by-association and to choose not to enter plea negotiations and

WHEREAS no one has a legal right or property interest in negotiating plea agreements other than the prosecutor and

WHEREAS Counts One through Four of Plaintiff's complaint fail to allege sufficiently a deprivation of a property interest and

WHEREAS Count Five through Eight of Plaintiff's complaint fail to allege sufficiently a violation of equal protection of the law and

WHEREAS Counts Nine through Twelve of Plaintiff's complaint fail to allege sufficiently a violation of Plaintiff's freedom of speech and

WHEREAS Counts Thirteen and Fourteen

of Plaintiff's complaint fail to allege a cause of action in that those counts only allege a willful or malicious conduct in communicating to persons in order to cause damage and

WHEREAS Plaintiff has otherwise failed to state a claim upon which relief can be granted and some government immunity applies, it is this 29th day of September, 1992

ORDERED that Defendants' motion to dismiss / motion for summary judgment be, and is hereby, GRANTED pursuant to Md. Rules 2-322(c) and 2-501(e), and it is further

ORDERED that the Clerk of the Court enter judgment for Defendants and against Plaintiff, and it is further

ORDERED that Plaintiff pay court costs.

/s/ RAYMOND E. BECK, SR., Judge

[Next page is 37.]

APPENDIX D

EXCERPTS FROM THE REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS IN THE CASE OF STATE OF MARYLAND v. GORDON LANDER CARTNAIL, CASE NOS. 17398, 17586, 17592 (Criminal) IN THE CIRCUIT COURT FOR CARROLL COUNTY, Westminster, Maryland, on Thursday, April 23, 1992:

ON MOTION TO REVOKE BOND

Excerpts from cross-examination of Detective Sergeant Andrew McKendrick, Westminster City Police, assigned to Maryland State Police, Drug Enforcement Unit, by Stephen P. Bourexis on behalf of Gordon Cartnail (Defendant) (R. M-22-23):

Q: Did you seem--say to him early on that, "By the way, the deal that we made is called off," remember that?

A: Yes, sir.

Q: Why did you say that?

A: I told him that if he continued to have you as re--as his counsel,

that I would not be working with him, and after the statements that were said at the end of the process, I have no intention of working with him, no matter who he has for counsel.

Q: I think in order for the Court to appreciate maybe his--his state of mind, do you remember precisely what you told him about- -about his--about his lawyer?

A: I told him if he had his attorney that he originally had in the case we--we could work with him.

Q: Uh-huh.

A: He asked me about Billy Murphy, Jr. I said I could work with Billy Murphy...

Q: Uh-huh.

A: And I told him I would not work if--if you were representing him as counsel.

* * *

A: I told him in no uncertain terms that if you represented you for counsel, we would not be working with him.

Q: Well, didn't you tell him that he should get rid of his counsel associated--meaning me, okay, because I was a fucking asshole?

A: No, sir, I did not say that. I told...

* * *

A: No, sir. I told him--said if you represented him during the case, that we would not be working with him. If he had other attorneys, it would be no problem.

* * *

(R. M-24-25)

A: He told me that he had other attorneys, and he named--I believe it was Mr. Walker, he had originally, and Billy Murphy were the two other attorneys that he had, and I told him if he had these attorneys, there would be no problem.

* * *

A: He asked me if he had Billy Murphy or the original lawyer in the case if we could still work. At that time, I said, "Yes."

* * *

(R. M-28)

Q: Sergeant McKendrick, did you feel I wouldn't adequately represent Mr. Cartnail?

A: When I talked to Mr. Cartnail, I had told him that we had dealings with you with other people that have attempted to work with us and when they have done that, nothing has worked out.

Q: And, that upset you?

A: I don't get upset if you're involved in the case. I get upset when things that the--somebody says they can do and that seems that is never done and it seems like you're a stumbling block along the way in trying to attempt these goals.

Excerpts from cross-examination of Trooper Robert Heisler (sic), Maryland State Police, assigned to Carroll County Narcotics Task Force, by Stephen P. Bourexis on behalf of Gordon Cartnail (R. M-38-39):

Q: ...Did--did you hear any conversation about--about his no longer being able to work with the Drug Task Force?

A: I wasn't aware that he was working with us. * * * As far as I know, that was all speculation; I mean, it wasn't something that hadn't been agreed upon.

Q: Okay. And, did you hear any comment at the end about--that--that he could be worked with if he changed lawyers?

A: Well, that's probably common knowledge with everybody in the Task Force...

Q: Okay.

A: ...I mean,...

Q: What--tell us what that--what's that common knowledge?

A: To--we're not gonna work with anybody that's represented by you, Mr. Bourexis.

Q: I see. Tell us why.

A: I really don't know why; it's--it's not something that I decide.

Q: So, it's just sort of a policy?

A: It's kind of a inter--interoffice policy right now.

Q: Right. Okay.

A: I don't think it's anything personal.

Q: Right. Now, Officer Heisler, in that light, I just wanna make certain that I've never done anything to personally offend you, have I?

A: Not personally.

Q: Okay.

A: Everything was of a business nature.

EXCERPTS FROM DIRECT EXAMINATION OF GORDON CARTNAIL BY STEPHEN P. BOUREXIS (R. M-46):

> Q: ...So, when you got downstairs in the back of the room that you're talking about, what happened at that stage?
>
> A: He [Sergeant McKendrick] look at 'em and he said, "By the way, the deal that we had is called off," and I asked him why. He said, "Because you have Bourexis"--I mean, he asked me who was my lawyer and I said, "I forgot his name," and he said--he told me your name and then I said, "Why won't you work with me?" He said, "Because he was an asshole," simple as that.

(R. M-47)

* * *

> Q: Then what--what was the next contact and discussion you had with either Officer McKendrick or Officer Heisler?
>
> A: By the way, McKendrick pulled me out of the cell and he--I asked him, "Why was the deal off; why wouldn't you work with me?" I said--he said, "Because you have Bourexis as a lawyer," and I asked him, "why?" and he said--he kept saying that you was a asshole and then I said, "Well, he told me that if I would work with you all to get a writ from the State's Attorney, Mr. Walker, saying

what--what kind of a deal was gonna be made," and then he said--I mean, I told--he said he's not gonna work with me if I had you as my lawyer, and I said, "Okay." * * * R. M-50-51.

Q: Now, was there--was there any discussion about you working with Detective Sergeant McKendrick as you were leaving to go back upstairs?

* * *

A: I asked him--I said, "If I use Roland Walker as attorney, could--do you use me as an informant?" And he said, yeah, I can work with anybody else besides you, and that's what he said, then that's when he was taking me back upstairs.

Q: Did you ask him why?

A: 'Cause you was a asshole, that's why. * * * R. M-52.

A: I feel as though that when my bail was set at $1500.00, McKendrick caught an attitude 'cause he thought I was going home he was trying to get my bail--trying to get more bail on me, and by him saying what he said about my lawyer and everything, I have double--I have, you know, thoughts in my mind about using him, because I think if I use him, that I will not get a fair trial if they gonna say that he's an asshole and everything, and I

don't think my trial is gonna be fair.

[Next page is 45.]

IN THE CIRCUIT COURT FOR CARROLL COUNTY

STEPHEN P. BOUREXIS *
235 E. Main Street
Westminster, Md. *
21157
(Carroll County) *

Plaintiff *

v. * Civ. No.
C-92-13193

THE CARROLL COUNTY *
NARCOTICS TASK
FORCE, a.k.a DRUG *
ENFORCEMENT BUREAU
*
Serve on
Barton F. Walker, *
III
Office of the *
State's Attorney
125 N. Court St. *
Westminster, Md.
21157 *
(Carroll County)
*
and
*
ANDREW McKENDRICK
Individually and *
in his capacity
as a member of *
the Carroll County
Narcotics Task *
Force
11 Longwell Avenue *
Westminster, Md.
21157 *
(Carroll County)
*

APPENDIX E
(Filed 6/5/92)

and *

ROBERT HEISLER *
Individually and
in his capacity *
as a member of
the Carroll County*
Narcotics Task
Force *
Barrack G
Westminster, Md. *
(Carroll County)
*
Defendants
*
* * *

COMPLAINT FOR INJUNCTIVE RELIEF AND FOR DAMAGES

Plaintiff Stephen P. Bourexis, by his attorneys Robin Page West and Judith S. Stainbrook, sues the Carroll County Narcotics Task Force, Andrew Mckendrick, individually and in his capacity as a member of the Carroll County Narcotics Task Force, and Robert Heisler, individually and in his capacity as a member of the Carroll County Narcotics Task Force, for injunctive relief and for damages and states:

FACTS COMMON TO ALL COUNTS

1. The Plaintiff is an attorney licensed to practice law in the State of Maryland whose private practice is located in Carroll County, Maryland.

2. The Carroll County Narcotics Task Force (a.k.a. Drug Enforcement Bureau) (hereinafter Task Force), located in Carroll County, Maryland, is composed of law enforcement officers from various law enforcement agencies who purport to operate under the laws of the State of Maryland; Andrew McKendrick and Robert Heisler are members of the Carroll County Narcotics Task Force who, at all times relevant to this complaint, acted individually and as members of the Task Force.

3. It is the policy and practice of the Defendants Task Force, McKendrick and Heisler to refuse to work with persons suspected of, or arrested in connection

with, drug offenses who are represented by the Plaintiff and not by other lawyers.

4. It is the policy and practice of the Defendants Task Force, McKendrick and Heisler to inform persons who have been arrested on drug-related charges that if such persons are represented by the Plaintiff that the Defendants will discriminate against them but will not discriminate against them if they use any other attorney. (Exhibits A and B)

5. It is the policy and practice of the Defendants Task Force, McKendrick and Heisler to inform the Plaintiff's existing clients that they will be discriminated against as long as they are represented by the Plaintiff. (Exhibit C)

6. The Defendants have adopted this policy and practice in order to damage the Plaintiff's practice by retaliating

against him for his representation of certain persons who have been charged with drug-related offenses and in order to prevent him from continuing to represent persons who have been charged with drug-related offenses.

COUNT ONE

7. Incorporates by reference the allegations of Counts 1 through 6.

8. This Count arises under 42 U.S.C. 1983.

9. The Plaintiff has a property interest in his livelihood which is created by the laws of the State of Maryland and is protected under the Constitutions of the United States and the State of Maryland.

10. The Defendants intentionally deprived, and are continuing to deprive, the Plaintiff of this property interest without due process of law as guaranteed by the Fourteenth Amendment to the United

States Constitution.

11. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

12. The Plaintiff's property interest has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

13. Because the Defendants have injured, and continue to injure, the Plaintiff in the practice of his profession, the Plaintiff has suffered and will continue to suffer irreparable injury unless injunctive relief is granted.

14. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal

representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

15. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000 in compensatory damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating

against such persons because they are represented by the Plaintiff.

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1983;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT TWO

16. Incorporates by reference the allegations of paragraphs 1 through 6.

17. This Count arises under 42 U.S.C. 1983.

18. The Plaintiff has a property interest in his livelihood which is created by the laws of the State of Maryland and is protected under the Constitutions of the United States and the State of Maryland.

19. The Defendants intentionally maliciously, or wantonly or oppressively, deprived, and are continuing to deprive, the Plaintiff of this property interest

without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

20. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

21. The Plaintiff's property interest has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

22. Because the Defendants have injured, and continue to injure, the Plaintiff in the practice of his profession, the Plaintiff has suffered and will continue to suffer irreparable injury unless injunctive relief is granted.

23. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public

interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

24. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000 in compensatory damages and 7,000,000.00 in punitive damages.

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing

persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff.

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT THREE

25. Incorporates by reference the allegations of paragraphs 1 through 6 and 12 through 15.

26. The Plaintiff has a property interest in his livelihood which is created by the laws of the State of Maryland and is protected under the Constitutions of the United States and the State of Maryland.

27. The Defendants intentionally

deprived, and are continuing to so deprive, the Plaintiff of this property interest without due process of law as guaranteed by Articles 19 and 24 of the Maryland Declaration of Rights.

28. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are

represented by the Plaintiff.

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT FOUR

29. Incorporates by reference the allegations of paragraphs 1 through 6 and 12 through 15.

30. The Plaintiff has a property interest in his livelihood which is created by the laws of the State of Maryland and is protected under the Constitutions of the United States and the State of Maryland.

31. The Defendants intentionally maliciously, or wantonly, or oppressively, deprived, and are continuing to so deprive, the Plaintiff of this property interest without due process of law as guaranteed by Articles

19 and 24 of the Maryland Declaration of Rights.

32. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages and $7,000,000.00 in punitive damages.

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff.

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT FIVE

33. Incorporates by reference the allegations of paragraphs 1 through 6.

34. This Count arises pursuant to 42 U.S.C. 1983.

35. The only way in which the Defendants relate to the Plaintiff is through the Plaintiff's clients; by discriminating against the Plaintiff's clients on the sole basis that they are the Plaintiff's clients, the Defendants are also intentionally and arbitrarily discriminating against the Plaintiff.

36. The Defendants are thereby depriving the Plaintiff of his right to equal protection of the laws in violation

of the Fourteenth Amendment to the Constitution of the United States.

37. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

39. The Plaintiff has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

40. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having

members of the Carroll County Narcotics Task Force make this selection for them.

41. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff.

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as

the Plaintiff's cause may require.

COUNT SIX

42. Incorporates by reference the allegations of paragraphs 1 through 6.

43. This Count arises under 42 U.S.C. 1983.

44. The only way in which the Defendants relate to the Plaintiff is through the Plaintiff's clients; by maliciously, or wantonly or oppressively discriminating against the Plaintiff's clients on the sole basis that they are the Plaintiff's clients, the Defendants are also intentionally and arbitrarily discriminating against the Plaintiff.

45. The Defendants are thereby maliciously, or wantonly or oppressively depriving the Plaintiff of his right to equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

46. The Defendants were acting, and

continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

47. The Plaintiff has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

48. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

49. There is a strong likelihood

that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages and $7,000,000.00 in punitive damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff.

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT SEVEN

50. Incorporates by reference the allegations of paragraphs 1 through 6.

51. The only way in which the Defendants relate to the Plaintiff is through the Plaintiff's clients; by discriminating against the Plaintiff's clients on the sole basis that they are the Plaintiff's clients, the Defendants are also intentionally and arbitrarily discriminating against the Plaintiff.

52. The Defendants are thereby depriving the Plaintiff of his right to equal protection of the laws in violation of Article 24 of the Maryland Declaration of Rights.

53. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

54. The Plaintiff has been

irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

55. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice,
rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

56. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following

relief against the Defendants:

A. $3,500,000.00 in compensatory damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff;

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT EIGHT

57. Incorporates by reference the allegations of paragraphs 1 through 6.

58. The only way in which the Defendants relate to the Plaintiff is through the Plaintiff's clients; by

maliciously or wantonly or oppressively discriminating against the Plaintiff's clients on the sole basis that they are the Plaintiff's clients, the Defendants are also intentionally and arbitrarily discriminating against the Plaintiff.

59. The Defendants are thereby maliciously or wantonly or oppressively depriving the Plaintiff of his right to equal protection of the laws in violation of Article 24 of the Maryland Declaration of Rights.

60. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

61. The Plaintiff has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

62. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

63. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages and $7,000,000.00 in punitive

damages.

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff;

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT NINE

64. Incorporates by reference the allegations of paragraphs 1 through 6.

65. This Count arises under 42 U.S.C. 1983.

66. The Defendants' actions violated the Plaintiff's right to freedom of speech as guaranteed by the First and

Fourteenth Amendments to the Constitution of the United States.

67. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

68. The Defendants' actions were designed to, and did, retaliate against the Plaintiff for the exercise of his Constitutionally protected right to freedom of speech to his general damage and to his continuing damage.

69. The Plaintiff has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

70. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal

representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

71. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating

against such persons because they are represented by the Plaintiff;

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT TEN

72. Incorporates by reference the allegations of paragraphs 1 through 6.

73. This Count arises under 42 U.S.C. 1983.

74. The Defendants maliciously or wantonly or oppressively violated the Plaintiff's right to freedom of speech as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

75. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State

of Maryland and the County of Carroll.

76. The Defendants' actions were designed to, and did, maliciously or wantonly or oppressively retaliate against the Plaintiff for the exercise of his Constitutionally protected right to freedom of speech to his general damage and to his continuing damage.

77. The Plaintiff has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

78. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather

an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

79. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages and $7,000,000.00 in punitive damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff;

C. The costs of this action, including attorneys' fees pursuant to 42

U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT ELEVEN

80. Incorporates by reference the allegations of paragraphs 1 through 6.

81. The Defendants' actions violated the Plaintiff's right to freedom of speech as guaranteed by Article 40 of the Maryland Declaration of Rights.

82. The Defendants were acting, and continue to act, under the color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

83. The Defendants' actions were designed to, and did, retaliate against the Plaintiff for the exercise of his Constitutionally protected right to freedom of speech to his general damage and to his continuing damage.

84. The Plaintiff has been

irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants. 85. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

86. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000 in compensatory damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff;

C. The reasonable costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT TWELVE

87. Incorporates by reference the allegations of paragraphs 1 through 6.

88. The Defendants maliciously or wantonly or oppressively violated the Plaintiff's right to freedom of speech as

guaranteed by Article 40 of the Maryland Declaration of Rights.

89. The Defendants were acting, and continue to act, under t' e color and pretense of the statutes, regulations, policies, customs and usages of the State of Maryland and the County of Carroll.

90. The Defendants' actions were designed to, and did, maliciously or wantonly or oppressively retaliate against the Plaintiff for the exercise of his Constitutionally protected right to freedom of speech to his general damage and to his continuing damage.

91. The Plaintiff has been irreparably damaged and is continuing to be irreparably damaged by the acts of the Defendants.

92. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive

relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

93. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000 in compensatory damages and $7,000,000.00 in punitive damages.

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated

against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff;

C. The costs of this action, including attorneys' fees pursuant to 42 U.S.C. 1988;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT THIRTEEN

94. Incorporates by reference the allegations of paragraphs 1 through 6.

95. The conduct of the Defendants and other members of the Carroll County Narcotics Task Force in communicating to Plaintiff's clients and to Plaintiff's prospective clients was intentional, willful and calculated to cause damage to Plaintiff's business.

96. The conduct of the Defendants and other members of the Carroll County Narcotics Task Force was perpetrated with

the intentional and improper purpose of causing damage and was without justifiable cause.

97. As a result of the Defendants' conduct and that of other members of the Task Force, certain clients and potential clients sought representation from attorneys other than Plaintiff.

98. As a result of the Defendants' actions and the actions of other members of the Task Force, the Plaintiff has suffered and will continue to suffer lost profits, other consequential damages, and irreparable harm to reputation.

99. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of

their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

100. There is a strong likelihood that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000 in compensatory damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff;

C. The costs of this action,

including attorneys' fees;

D. Such other and further relief as the Plaintiff's cause may require.

COUNT FOURTEEN

101. Incorporates by reference the allegations of paragraphs 1 through 6.

102. The conduct of the Defendants and other members of the Carroll County Narcotics Task Force in communicating to Plaintiff's clients and to Plaintiff's prospective clients was intentional, willful, malicious and calculated to cause damage to Plaintiff's business.

103. The conduct of the Defendants and other members of the Carroll County Narcotics Task Force was perpetrated with the intentional, malicious and improper purpose of causing damage and was without justifiable cause.

104. As a result of the Defendants' conduct and that of other members of the Task Force, certain clients and potential

clients sought representation from attorneys other than Plaintiff.

105. As a result of the Defendants' actions and the actions of other members of the Task Force, the Plaintiff has suffered and will continue to suffer lost profits, other consequential damages, and irreparable harm to reputation.

106. Any benefit to the Plaintiff outweighs any harm to the Defendants if an injunction is granted, and the public interest is best served by injunctive relief since persons seeking legal representation have a Constitutionally protected interest under the Sixth Amendment in selecting the attorney of their choice, rather than the State's choice, and no useful purpose, but rather an unlawful purpose, is served by having members of the Carroll County Narcotics Task Force make this selection for them.

107. There is a strong likelihood

that the Plaintiff will succeed on the merits of his claim.

WHEREFORE the Plaintiff requests that this Court award him the following relief against the Defendants:

A. $3,500,000.00 in compensatory damages and $7,000,000.00 in punitive damages;

B. An injunction against the Defendants from continuing to deprive the Plaintiff of business by informing persons that they will be discriminated against if they are represented by the Plaintiff and from in fact discriminating against such persons because they are represented by the Plaintiff;

C. The costs of this action, including attorneys' fees;

D. Such other and further relief as the Plaintiff's cause may require.

I affirm under the penalties of perjury that the information contained in the foregoing Complaint is true to the best

of my knowledge, information and belief.

Stephen P. Bourexis
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JURY TRIAL DEMAND

The Plaintiff requests that all issues triable before a jury be tried before a jury.

Judith S. Stainbrook

No. 93-1214

Supreme Court, U.S.
FILED
FEB 24 1994
CLERK

In The

Supreme Court of the United States

October Term, 1993

STEVEN P. BOUREXIS,

Petitioner,

v.

CARROLL COUNTY, MARYLAND,
NARCOTICS TASK FORCE, et al.

Respondents.

On Petition For
Writ of Certiorari to the
Court of Special Appeals of Maryland

BRIEF OF OFFICER ANDREW McKENDRICK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles S. Fax
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(410) 385-4271

Counsel for Respondent
Andrew McKendrick

February 24, 1994

QUESTIONS PRESENTED

1. Whether police officers, acting as members of a narcotics task force consisting of prosecutors and police officers from several jurisdictions, by declining to engage in plea negotiations with criminal suspects who are represented by a particular attorney, violate the constitutional rights of that attorney to due process, equal protection, or free speech.

2. Whether an appellate court, in affirming the judgment of the court below dismissing appellant's suit for failure to state a claim upon which relief may be granted, has violated the due process rights of appellant in reaching its judgment by considering, inter alia, evidence submitted in the record below by appellant.

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II. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE COURT OF SPECIAL APPEALS DID NOT VIOLATE BOUREXIS' DUE PROCESS RIGHTS BY CONSIDERING EVIDENCE SUBMITTED BY HIM IN THE CIRCUIT COURT IN CONCLUDING THAT HE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED 16

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STATUTORY PROVISIONS

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §12-201 6

Except as provided in §12-202 of this title, in any case or proceeding pending in or

decided by the Court of Special Appeals upon appeal fom a circuit court or an orphans' court or the Maryland Tax Court, any party, incuding the State, may file in the Court of Appeals a petition for certiorari to review the case or proceeding. The petition may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than the time prescribed by the Maryland Rules. In a case or proceeding described in this section, the Court of Appeals also may issue the writ of certiorari on its own motion.

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §12-203 7

If the Court of Appeals finds that review of the case described in § 12-201 is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that the case be certified to it for review and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

STATEMENT OF THE CASE

The Carroll County Narcotics Task Force ("the Task Force") is an inter-governmental task force including prosecutors, Maryland State Police troopers and members of the Westminster, Maryland, Police Department whose purpose is the County-wide investigation and prosecution of drug and drug-related crimes. Respondent Andrew McKendrick ("Officer McKendrick") is a member of the Westminster Police Department assigned to the Task Force.

Petitioner Steven Bourexis ("Bourexis") is an attorney in Carroll County. His practice includes the representation of suspects accused of drug and drug-related crimes. Bourexis filed a complaint for injunctive relief and damages in the Circuit Court for Carroll County against the Task Force, Officer McKendrick and Maryland State Trooper

Robert Heuisler, another member of the Task Force. Bourexis alleged that the Task Force and the individually named defendants, as a matter of policy and practice, refused to "work with" suspects represented by him, thereby depriving him of his property interest in his livelihood, violating his constitutional rights to equal protection and freedom of speech, and tortiously interfering with his business relations. Contemporaneously with the filing of his complaint, Bourexis moved for an interlocutory injunction preventing the Task Force from continuing this practice.

All defendants filed motions to dismiss or in the alternative for summary judgment. In his motion, Officer McKendrick argued, inter alia, that Bourexis failed to state a claim against him because (1) Bourexis has no consti-

tutionally protected right or interest in plea bargaining on behalf of his clients, (2) Bourexis' clients have no constitutionally protected right or interest in negotiating plea agreements, and (3) even if his clients had some constitutionally protected interest in negotiating a plea bargain, Bourexis could not bring their constitutional claims derivatively. Officer McKendrick also argued that he is entitled to both absolute prosecutorial and qualified official immunity.

After a hearing on the motions, at which Bourexis testified and presented other evidence, the circuit court denied Bourexis' request for injunction, granted the respondents' dispositive motions and entered judgment in their favor, finding that Bourexis failed to state a claim and that respondents were immune from suit.

On appeal, the Court of Special Appeals of Maryland, the State's intermediate appellate court, affirmed the judgment. Bourexis v. Carroll County Narcotics Task Force, 96 Md. App. 459 (1993), reprinted at pages A. 2 through A. 31 of the Petition for Writ of Certiorari. In his appeal, Bourexis acknowledged that his complaint regarding the Task Force's "refusal to 'work with' his clients" reduced to "discrimination threatened or practiced ... in the context of excluding them from the opportunity to obtain the benefits derived from a plea agreement." Id. at A. 6.

The Court of Special Appeals observed that "the essence of [Bourexis'] grievance is that the defendants have interfered with his occupational opportunities by making him less desirable to have as a lawyer." Id. at A. 30. In the absence of

any allegation or evidence that the Task Force policy actually caused him to lose any client or prospective client, however, or compelled him to lower his fees in order to attract or maintain business, the Court of Special Appeals held that Bourexis had not stated a claim. The court concluded simply that Bourexis "has alleged conduct that may be wrongful to others but none that has wronged him." Id. at A. 31 (emphasis in original).

The Court of Special Appeals did not reach the issue of whether Bourexis, as attorney, has any constitutionally protected right or interest to negotiate plea bargains on behalf of his clients who are criminal suspects. Further, the court did not reach the issue of the prosecutorial or official immunity which the circuit court found to be a bar to Bourexis' claim.

Bourexis petitioned the Court of Appeals of Maryland for a writ of certiorari pursuant to Md. Code Ann., Cts. & Jud. Proc. Art., §12-201 (1974, 1989 Repl. Vol., 1993 Cum. Supp.), raising three questions. The first question was substantively identical to the first question presented in this Court. The second question was whether

> a criminal defense attorney [must] suffer actual loss of business before an injunction may issue restraining a law enforcement task force and its members from refusing to work with that attorney's clients solely because they are his clients or is the threat of imminent and irreparable harm to the attorney's practice sufficient.

The third question concerned the capacity of the Task Force to be sued. The petition for certiorari in the Court of Appeals did not raise the constitutional question of whether the Court of Special Appeals had violated Bourexis' right to

due process in its affirmance of the trial court's decision on the record.

The Court of Appeals denied the petition on October 28, 1993, finding that Bourexis had not shown that review by certiorari would be desirable and in the public interest, the standard required under Maryland law for the issuance of the writ. Md. Code Ann., Cts. & Jud. Proc. Art., §12-203.

In this Court, the Task Force and Officer Heuisler have filed a separate brief in opposition to Bourexis' petition for writ of certiorari. Officer McKendrick incorporates by reference the arguments set forth in their brief.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MERIT REVIEW BECAUSE BOUREXIS' ALLEGATION THAT THE TASK FORCE'S POLICY NOT TO ENGAGE IN PLEA NEGOTIATIONS WITH CRIMINAL SUSPECTS REPRESENTED BY HIM FAILED TO STATE A CLAIM FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Bourexis acknowledged before the Court of Special Appeals that his claims derive entirely from his allegation that the Task Force routinely advises criminal suspects that, if they retain him as their lawyer, the Task Force will not "work with" them. Although he did not define the phrase "work with" in his complaint in the circuit court, Bourexis testified at the hearing on his motion for interlocutory injunction that he understood the phrase to refer to cooperative efforts between the Task Force and suspected drug offenders. In "working with" the Task Force, the suspect might provide information or other cooperation to the Task

Force in exchange for favorable consideration from the prosecutor or judge, which may include dropping or reducing charges, stipulating to facts, agreeing not to allocute at sentencing, and mitigating punishment. In substance, "working with" the Task Force involves activities at the heart of the plea bargaining process. See Santobello v. New York, 404 U.S. 257, 260 (1971).

Bourexis conceded that "the only way in which the Defendants relate to [him] is through [his] clients." Thus, Bourexis' assertion of a constitutional right is wholly derivative of any right of his clients to engage in plea negotiation activities. Neither Bourexis nor his clients, however, have any constitutionally protected right to or interest in negotiating plea agreements.

Criminal suspects have no constitutionally protected right to compel negotiated dispositions of their cases. Weatherford v. Bursey, 429 U.S. 545, 561 (1977). The Court in Weatherford clearly stated that

> [t]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.

429 U.S. at 560-561. Certainly, the State's failure to adhere to a promise contained in a plea agreement may provide a defendant the right to attack his conviction or sentence. Santobello v. New York, 404 U.S. 257, 257 (1971). Such a right, however, arises only after "plea discussions are voluntarily entered into by authorized governmental agents; there is no constitutional right in defendants

to have the government 'bargain' in the first instance." Cooper v. United States, 594 F.2d 12, 19-20 (4th Cir. 1979).

Bourexis does not allege that the Task Force violated agreements or reneged on proposed deals where clients relied upon reasonably formed expectations. He claims simply that the Task Force refused in the first instance to "work with" his clients. This is not a cognizable claim because, as a matter of law, Bourexis' clients cannot compel the government to negotiate with them. Refusing to "work with" a suspect is the prerogative of the Task Force, and would not violate the constitutional right of the suspect. A fortiori, the refusal to "work with" clients of Bourexis does not violate any derivative right of Bourexis to participate in plea bargaining.

Moreover, Bourexis has no independent property right to practice his profession by compelling the criminal prosecutor to participate in plea negotiations with him. As the Court explained in Board of Regents v. Roth, 408 U.S. 564, 577 (1972),

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Although Bourexis acknowledges that property interests must stem from a source independent of the Constitution, he fails to point to any such source for the property interest he would assert. He first suggests that his "right" may stem from the state's recognition of the attorney-client privilege. Petition for Writ of Certiorari at 15. Of course, this

privilege cannot create any property right in the attorney because the privilege belongs to the client. See Harrison v. State, 276 Md. 122, 131-136 (1975).

He next states that his property right is "created under state statutes, rules of procedure, and common law," Petition for Writ of Certiorari at 16, and he points to the preamble to the Maryland Lawyers' Rules of Professional Conduct. The portion of the Preamble quoted by Bourexis, Petition for Writ of Certiorari at 16-17, expresses nothing more than the concept that authority over the legal profession, as declared in Rules of Professional Conduct, ought to be vested in the judicial system. It does not purport to create a property interest in a given attorney-client relationship, and certainly does not vest in the attorney the right to compel a prosecutor to nego-

tiate plea bargains with him on behalf of his clients.

Bourexis has no employment or other contractual relationship with the State and has not been deprived of any State benefit or other entitlement. No officer of the Task Force prevented him from representing any client who desired to be represented by him, and his entitlement to practice law was not limited in any way by the alleged refusal to "work with" his clients. His general property interest in his livelihood is not at all infringed by the policy of the Task Force not to plea bargain with certain criminal suspects. Thus, he has not been deprived of any property interest by the State.

Furthermore, even if Bourexis had some constitutional property right at stake, Bourexis failed to state a claim for infringement of his property right

because he failed to show that this right was infringed in any way. The Court of Special Appeals correctly found that Bourexis did not allege or show any harm flowing to him from the policy of the Task Force not to "work with" criminal suspects represented by Bourexis.

Bourexis lacks a constitutional right to participate in plea negotiations. That, coupled with the absence of legally redressable harm to him flowing from the discretionary refusal of the Task Force to participate in plea negotiations with him in his capacity as defense counsel, makes this case unworthy of the Court's attention.

II. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE COURT OF SPECIAL APPEALS DID NOT VIOLATE BOUREXIS' DUE PROCESS RIGHTS BY CONSIDERING EVIDENCE SUBMITTED BY HIM IN THE CIRCUIT COURT IN REACHING ITS DETERMINATION THAT HE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

At the threshold, the constitutional question of whether the Court of Special Appeals violated Bourexis' right to due process was not "timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." Rules of the Supreme Court of the United States, Rule 14(h). Bourexis states that "the asserted violation of due process that occurred when the appellate court affirmed on the ground that Petitioner had failed to show economic harm was not raised below, because the issue did not appear until issuance of the opinion of the Court of Special Appeals." Petition for Writ of

Certiorari at 10. Thus he implies that there was no forum, before this one, in which to raise the issue. He ignores, however, the fact that he filed a petition for a writ of certiorari with the Court of Appeals of Maryland. In his petition, Bourexis raised the issue of whether the Court of Special Appeals erred in determining that he must show economic harm, but he did not raise the issue of whether the action of the Court of Special Appeals violated his constitutional right to due process. See Saunders v. Shaw, 244 U.S. 317, 320 (1917) (where a state appellate court issued a "surprise" ruling which spawned the federal question, petitioner properly and timely raised the federal issue for the first time in a petition for rehearing in that court, meeting the jurisdictional requirement for Supreme Court review).

His failure to raise the constitutional issue at the appropriate time deprived the Court of Appeals of Maryland of the opportunity to decide the issue in the first instance. His failure to raise the question below is sufficient ground to deny the petition. See Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 313 n.6 (1968) (noting that, where a party failed to present the federal question to the state supreme court, the Supreme Court would decline to consider the issue); Beck v. Washington, 369 U.S. 541, 553 (1962) (holding that a litigant who failed to raise a federal issue in his "assignment of errors" in the state supreme court had waived the issue).

Turning to the substance of the issue, it is clear that the Court of Special Appeals did not violate Bourexis' right to due process in the manner here

claimed. Bourexis contends that his claim against respondents is a form of property, which the Court of Special Appeals "extinguished" without giving him a meaningful opportunity to be heard. Petition for Writ of Certiorari at 18-19. He asserts that the Court of Special Appeals decided the case against him "on a factual ground ... not reached by the trial court and not raised by the moving party." Petition for Writ of Certiorari at 18, argument heading 2. This argument, along with Bourexis' contention that he "never had an opportunity to demonstrate that economic injury flowed from the actions complained of", id. at 19 (emphasis in original), is disproved by the procedural history of the case.

First, Bourexis, in his memorandum in opposition to defendant McKendrick's motion to dismiss and in support of

plaintiff's motion for interlocutory injunction, argued, inter alia, that he suffered economic injury as a result of the policy of the Task Fcrce. In that memorandum he stated that "[t]he Defendant's conduct continues to irreparably harm the Defendant's [sic] reputation and his business which is, of course, the Defendant's intent." Excerpt from memorandum in opposition to defendant McKendrick's motion to dismiss and in support of plaintiff's motion for interlocutory injunction, at 7, reprinted herein as A. 1 to A. 3.

Second, there was a hearing on the motion for interlocutory injunction, at which Bourexis testified, called two witnesses, and presented other evidence. One of the prerequisites under Maryland law for issuance of an interlocutory injunction is that the movant will suffer

irreparable injury unless the injunction is granted. See Department of Transportation v. Armacost, 299 Md. 392, 404-405 (1984). Necessarily, that issue received considerable attention at the hearing on Bourexis' motion for interlocutory injunction. After considering the pleadings, evidence and arguments advanced by counsel for all parties, the circuit court concluded that Bourexis "has not met the burden for an Injunction" on "the elements that a Court must find before granting an injunction -- Interlocutory Injunction, likelihood of success, damages, balance of convenience, and public interest." Transcript of Proceedings on Motion for Interlocutory Injunction and Motion to Dismiss at M-113 (emphasis added),

reprinted herein as A. 4 to A. 5.[1] Thus, it is clear that the circuit court considered whether Bourexis had "met the burden" with respect to "damages." Ibid.

In his principal brief on appeal to the Court of Special Appeals, Bourexis argued that the denial of the injunction was improper because he had satisfied all of the requirements for its issuance, including the requirement of injury. Bourexis reiterated his position at oral argument. In rejecting Bourexis' claim, the Court of Special Appeals noted that he had not made any contention, "either in his complaint or in the evidence offered

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[1] At that hearing, Officer McKendrick argued in the alternative that if the court found that Bourexis suffered some injury, it was at most a monetary injury which can be redressed at law and therefore, that an injunction should not issue. Thus, contrary to petitioner's assertion, Petition for Writ of Certiorari at 19, respondents did not defend the motion for interlocutory injunction solely on the ground that petitioner suffered financial injury for which he should receive damages.

at the hearing," that he had suffered economic injury. Bourexis v. Carroll County Task Force, at A. 30 of Petition for Writ of Certiorari (emphasis added).

In light of the ample opportunities that Bourexis had -- and of which he took full advantage -- to demonstrate economic injury, the Court of Special Appeals' conclusion that Bourexis failed to show he had suffered or would suffer any economic harm was not a violation of Bourexis' due process rights.[2]

CONCLUSION

For all of the reasons discussed above, and for the reasons expressed in the brief in opposition to petition for

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[2] The cases cited by Bourexis, Ungar v. Handelsman, 325 Md. 135 (1992) and Phillips v. Venker, 316 Md. 212 (1989), are inapposite. In those cases, each court actually determined a matter against a party without first hearing from that party. Here, both the trial court and the intermediate appellate court heard from Bourexis extensively on the precise issue resolved against him.

writ of certiorari filed by respondents Carroll County Narcotics Task Force and Officer Robert Heuisler, the petition for certiorari should be denied.

Respectfully submitted,

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Andrew McKendrick

February 24, 1994

IN THE CIRCUIT COURT FOR CARROLL COUNTY

STEPHEN B. BOUREXIS *
Plaintiff

* Case No. C-
v. 92-13193 CV
*

CARROLL COUNTY NARCOTICS
TASK FORCE, et al. *
Defendants

* * * * * * * * *

MEMORANDUM IN OPPOSITION TO DEFENDANT McKENDRICK'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR INTERLOCUTORY INJUNCTION

Plaintiff submits the following Memorandum in Opposition to Defendant McKendrick's Motion to Dismiss or, In the Alternative, for Summary Judgment, and also in support of the Plaintiff's Motion for Interlocutory Injunction.

I. STATEMENT OF FACTS

* * *

II. ARGUMENT

* * *

3. Is the Plaintiff entitled to injunctive relief?

For the forgoing reasons, the Plaintiff has shown that he does have a substantial likelihood of succeeding on the merits of his claim, that there is absolutely no public interest to be served in allowing the Task Force to pursue its unlawful course of conduct, and that the Plaintiff has been, and is being, irreparably injured by this unlawful conduct.

It is well-settled that a Plaintiff's request for money damages does not bar injunctive relief. Rule BB76; Anne Arundel County v. Whitehall Venture, 39 Md.App. 197 (1978). The Defendant's conduct continues to irreparably harm the Defendant's reputation and his business which is, of course, the Defendant's intent. If the Defendant can show that he is able to put up a bond to indemnify the Plaintiff for his claimed damages, then

perhaps the Defendant might have a point worth arguing. However, the Defendant has made no such attempt. Otherwise, the Defendant's position is patently frivolous, given the enormity of the damage he is intentionally inflicting on the Plaintiff.

III. CONCLUSION

* * *

IN THE CIRCUIT COURT FOR CARROLL COUNTY

STEPHEN B. BOUREXIS Plaintiff	*	
	*	Case No. C-92-13193 CV
v.	*	
CARROLL COUNTY NARCOTICS TASK FORCE, et al. Defendants	*	

* * * * * * * * *

EXCERPT FROM THE REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS IN THE CASE OF STEPHEN P. BOUREXIS V. THE CARROLL COUNTY NARCOTICS TASK FORCE, ET AL., CASE NO. C-92-13193 CV, IN THE CIRCUIT COURT FOR CARROLL COUNTY, MARYLAND, Westminster, Maryland on Friday, September 18, 1992:

ON MOTION FOR INTERLOCUTORY INJUNCTION AND MOTION TO DISMISS (M-113):

* * *

THE COURT: All right. On the question, first, of the Injunction and the elements that a Court must find before granting an Injunction -- Interlocutory Injunction, likelihood of success, damages, balance of

convenience, and public interest, the Court finds that the Plaintiff has not met the burden for an Injunction, and will deny the request for the Injunction.

Based on the cause of action and governmental immunity and whether or not there is an underlying right, I want to read your Memorandums in the cases that you cited, so the Court will reserve on the ques -- on the Motion to Dismiss and/or Summary Judgment. Give you an answer within the next couple of weeks in writing.

Thank you.

* * *